Supreme Court, U.S.
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No. 02-1036

In The

Supreme Court of the United States

WESTINGHOUSE ELECTRIC CORPORATION, *et al.*,

Petitioners,

v.

RAYMOND FREIER, individually, as Administrator of the Estate of Rose Freier, deceased, and as surviving spouse of Rose Freier, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The 1986 Superfund Amendments and Reauthorization Act ("SARA") amendments to the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") include a provision, 42 U.S.C. § 9658, that establishes a federal accrual date for certain actions "brought under State law for personal injury, or property damages." The federal accrual date is defined as "the date the plaintiff knew (or reasonably should have known) that the personal injury or property damages . . . were caused or contributed to by the hazardous substance or pollutant or contaminant concerned."

The questions presented are:

1) Whether Congress acted within its constitutional authority granted by the Commerce Clause, and also acted within the constraints of the Tenth Amendment, in enacting this federal accrual rule for state tort law claims.

2) Whether, on application of the above accrual rule, summary judgment is precluded by the existence of competing inferences from the record as to whether Plaintiffs knew or should have known of the cause of their injuries.

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STATEMENT OF THE CASE

Respondents Raymond Freier, *et al.* (the "Freier Respondents") are among 63 plaintiffs who have brought claims for themselves and their decedents, based on cancers they claim resulted from exposures to toxins released from the Pfohl Brothers Landfill ("the Landfill") in Cheektowaga, New York. For a complete statement of the case, the Freier Respondents refer the Court to the opinion of the court of appeals at Cert. App.1a-33a, and they incorporate that discussion herein.

The Freier Respondents filed their lawsuits between January 1995 and January 1997, after first being informed of a probable connection between the Landfill and their injuries in December 1994. That information came from the preliminary results of the Pfohl Environmental Health Study conducted by Drs. David Rigle and William Sawyer ("the Rigle-Sawyer Report"), which was an epidemiologic survey of residents who had lived, worked, or recreated near the Landfill. The preliminary results of the Rigle-Sawyer Report indicated that persons who frequented the immediate vicinity of the Landfill had an increased risk of developing a variety of cancers, when compared with other local residents who lived or worked farther from the Landfill. In response to learning those preliminary findings, the Freier Respondents filed their suits in small groups over the following months.

For years prior to the release of the preliminary results of the Rigle-Sawyer Report, the Landfill had received significant public attention. However, dozens of public reports reassured local residents that the Landfill had never posed any human health risk. The New York State Department of Health had conducted its own epidemiologic

survey, concluding that the Landfill posed no health risk. Prior to December 1994, these findings and other reassuring reports from state environmental and health authorities were conveyed through the local media and at public meetings. *See, e.g.*, Cert. App. 20a-29a.

The Petitioners in this case are a group of defendants that include both the owners and operators of the Landfill, as well as those who allegedly generated or transported toxic waste to the site. At the trial court, Petitioners sought summary judgment on the basis of the statute of limitations, asserting that the Freier Respondents' claims were time-barred under applicable New York limitations law. The Freier Respondents agreed that their claims would be barred under New York law, but they asserted that material questions of fact existed as to whether their claims were timely due to the application of the "federally required commencement date," or "FRCD," contained in the 1986 Superfund Amendments and Reauthorization Act ("SARA") amendments to the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"). The FRCD, codified at 42 U.S.C. § 9658, provides a federal accrual date for certain state law claims alleging injuries from the release of toxins at a "facility," as that term is defined in CERCLA.[1] The FRCD provides that such claims will accrue no earlier than the time that the "plaintiff knew (or reasonably should have known) that the personal injury or property damages . . . were caused or contributed to by the hazardous substance or pollutant or contaminant concerned."

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[1] In this case, all parties acknowledge that the Landfill is a "facility" for purposes of the statute.

Petitioners challenged both the applicability and constitutionality of the FRCD. They also contended that, even if the FRCD survived constitutional scrutiny and applied to Plaintiffs' claims, those claims were nonetheless time-barred as a matter of law. According to Petitioners, the record supported only one possible conclusion – that the plaintiffs knew or reasonably should have known of the connection between the Landfill and their injuries prior to the end of 1991.

The trial court granted summary judgment despite agreeing with the Freier Respondents that the FRCD applied to their claims, and that the statute was constitutional. The trial court sided with Petitioners that Plaintiffs knew or reasonably should have known the connection between their injuries and the Landfill by no later than the end of 1991.

The court of appeals reversed, holding that material questions of fact exist as to when the Plaintiffs knew or reasonably should have known that the Landfill contributed to their injuries. The court also held that Congress acted within its authority under the Commerce Clause in enacting the FRCD, and that the statute's enactment did not improperly invade state sovereignty as protected by the Tenth Amendment. Petitioners then sought a writ of certiorari from this Court.

REASONS FOR DENYING THE WRIT

1. The Court of Appeals Correctly Determined That Congress Had Constitutional Authority to Enact the FRCD.

Contrary to Petitioner's contentions, Congress acted fully within its Commerce Clause authority in enacting the FRCD, and in no way overstepped the bounds of the Tenth Amendment.

a. The Commerce Clause

Congress has authority to enact a statute under the Commerce Clause if the statute "regulates activities that arise out of or are connected with a commercial transaction when the transaction and the activities, viewed in the aggregate, substantially affect interstate commerce." Cert. App. 44a (citing *Wickard v. Filburn*, 317 U.S. 111, 127-29 (1942)). Moreover, every piece of a statutory program that affects interstate commerce in the aggregate need not have its own substantial connection with commerce. "An individual provision will survive a Commerce Clause challenge if it is 'an integral part of the regulatory program[,] and . . . the regulatory scheme when considered as a whole' can be shown to be 'independently and directly related to a valid congressional goal.'" Cert. App. 44a-45a (quoting *Hodel v. Indiana*, 452 U.S. 314, 329 n.17 (1981) (bracket and ellipsis in original)).

In this case, the FRCD both has its own substantial connection with interstate commerce, *and* it is an integral part of CERCLA as a whole.

As an initial matter, the FRCD has an independent impact on commerce sufficient to bring it within Congress'

Commerce Clause powers. Because claim accrual rules often determine whether a defendant may be liable in a toxic tort case, such rules can and do have a substantial impact on interstate commerce. The legislative history of the SARA amendments to CERCLA confirm the commercial impact of claim accrual rules in the toxic tort setting. In originally enacting CERCLA, Congress created a "Section 301(e) Study Group," assigning the group the responsibility of "determin[ing] the adequacy of existing common law and statutory remedies in providing legal redress for harm to man and the environment caused by the release of hazardous substances into the environment." 42 U.S.C. § 9651(e). The group's report, issued in September 1982, eventually served as one basis for Congress' adoption of the FRCD as part of the SARA amendments.

The Section 301(e) Study Group determined that statutes of limitation posed a "major barrier" to recovery in toxic injury claims. The Group thus recommended adoption of the "discovery rule" for determining accrual of toxic injury claims, both by states for tort lawsuits and by the federal government, for purposes of an administrative claims program to compensate those alleging toxic injuries. The Group recommended creation of such an administrative claims program, which would make payments from a fund to be created as a result of a tax on industries that create toxic waste. Despite misgivings from certain members of the Study Group regarding imposition of such an industry tax, the Group as a whole believed the tax was justified due to the economic burdens created by industry pollution: "[a]s a general principle, the economic cost of injury should be carried by the industry or enterprise that creates them, because efforts to reduce the cost will result

in greater care and more safety and protection of the public." "A Report to Congress in Compliance with Section 301(e) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 by the 'Superfund Section 301(e) Study Group,'" (hereinafter "Study Group Report"), September 1982 at 248.[2] The Study Group Report thus confirms the commercial impact of claim accrual rules, which help allocate the economic costs of pollution to industry by determining whether injury claims will go forward.

The court of appeals below also found that application of the FRCD creates greater incentives to clean up hazardous waste sites, by making it more likely that a company that fails to do so will face liability. Cert. App. 49a-50a. But in addition to these conduct incentives created by the FRCD, its greatest commercial impact comes from Congress' overarching policy decision that industry, rather than exposed victims, should bear the costs of toxic injuries. Such injuries burden our citizens and health care system, and Petitioners cannot seriously question that this economic burden has a substantial impact on interstate commerce. Clearly the Commerce Clause grants Congress the power to allocate to industry the ultimate liability for creation of that economic cost. As the Study Group Report confirms, the FRCD was created as part of such an allocative decision.

Apart from the FRCD's independent impact on commerce, it also survives Commerce Clause scrutiny because

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[2] The full text of the Study Group Report is available on Westlaw as "A&P SARA Comm. Print 1982," in the "SARA-LH" database.

it is an integral part of CERCLA as a whole. Petitioners admit that CERCLA, which creates a broad regulatory program for dealing with hazardous waste sites, has a substantial effect on commerce. Petitioners nonetheless contend that the FRCD fails Commerce Clause scrutiny because it is not an integral part of CERCLA. Pet. at 8-9. However, the history of CERCLA and the FRCD belie this argument.

By creating the Section 301(e) Study Group, Congress expressly indicated the importance to CERCLA of "the adequacy of existing common law and statutory remedies in providing legal redress for harm to man and the environment caused by the release of hazardous substances into the environment." 42 U.S.C. § 9651(e). CERCLA provides a regulatory framework for cleanup of hazardous waste sites and allocation of the costs associated with such cleanup efforts. Although the statute does not create tort remedies for harms caused by those same hazardous waste sites, the very fact that Congress included Section 301(e) in CERCLA provides clear indication that such remedial concerns were integral to Congress' overall purposes. Indeed, that provision specifically directs the Study Group to address the barriers to recovery posed by statutes of limitations. 42 U.S.C. § 9651(e)(3)(F). Moreover, when the Study Group returned its findings in 1982, Congress quickly acted on the Group's recommendations by creating the FRCD as part of the 1983 SARA amendments. Although the Group had not recommended the FRCD as such, it had clearly recommended that both state and federal authorities adopt the discovery rule for dealing with claims arising from toxic exposures. *See, e.g.*, Study Group Report at 246 ("The Study Group recommends that the 'discovery rule' apply to all claims and that claims not

be time-barred by reason of the passage of time from exposure or injury to the discovery of the illness or injury on which the claim is based . . .").

If the FRCD were not "integral" to CERCLA, Congress would have not chosen to include section 301(e) in the original statute, or it would have ignored the subsequent recommendation of the Group to adopt the discovery rule. Instead, Congress both requested a recommendation and followed it.

b. The Tenth Amendment

Congress did not violate state sovereignty by enacting the FRCD. Unlike the statute at issue in *Printz v. United States*, 521 U.S. 898 (1997), the FRCD in no way "commandeers" state officers or agents to implement a federal regulatory scheme. To the contrary, the FRCD imposes no obligation on any state officials other than judges, who, as a result of the Supremacy Clause, must often enforce federal prescriptions. *Printz*, 521 U.S. at 907; Cert. App. at 52a (citing *New York v. United States*, 505 U.S.144, 178-79 (1992)).

Petitioners' contention that enactment of the FRCD "commandeers" the state legislative process is wrong. *See* Pet. at 11-15. The FRCD neither requires nor requests state legislatures to take any action. Its implementation does not depend in any way upon state legislative action. Petitioners' argument boils to a contention that, any time federal law trumps otherwise applicable state law, Congress has effectively "commandeered" state legislatures. If accepted, such an argument would empty the Supremacy Clause of meaning, and strip Congress of its power.

The fact that the FRCD must be applied in connection with state laws that Congress chose not to usurp does not mean that the FRCD tramples states' rights. Petitioners essentially argue that the FRCD violates the Tenth Amendment because Congress chose to tread on state sovereignty less heavily than the Commerce Clause would have permitted. But the mere fact that, in enacting the FRCD, Congress chose not to interfere with states' decisions regarding provision of toxic tort remedies and the length of limitations periods does not mean that creation of the FRCD is invalid. Such counter-intuitive reasoning provides no grounds for this Court to grant certiorari.

Finally, the Freier Respondents note that the constitutional issues raised here have been unanimously resolved by the six lower court judges to have addressed them. In this case, the magistrate judge, the district court judge, and the three court of appeals judges all agreed that the FRCD did not violate the Constitution. And they all agreed with the district court judge in *Bolin v. Cessna Aircraft Co.*, 759 F. Supp. 692 (D. Kan. 1991). Although these constitutional issues are admittedly important, the unanimity of the lower courts with respect to these issues demonstrates that they are not of such difficulty to create a need for this Court to address them.

2. This Court's Decision in *Jinks v. Richland County* Will Not Dictate the Outcome in this Case.

The Freier Respondents respectfully disagree with their co-Respondent, the United States of America, to the extent the United States suggests that this Court should hold the petition for certiorari pending its decision in

Jinks v. Richland County, No. 02-258 (U.S., argued March 5, 2003).

Whatever the outcome in *Jinks*, that decision will not control this case. The constitutional issue in *Jinks* is sharply distinct from the issues here for two reasons: 1) Congress passed the statute at issue in *Jinks*, 28 U.S.C. § 1367(d), under its Article III authority to develop procedures for the federal courts, rather than under the Commerce Clause; and 2) the arguments in *Jinks* center around the thorny sovereignty problem of immunity for state political subdivisions – an issue nowhere raised in this case.

Because the constitutional issues in *Jinks* raise different legal concerns than the constitutional issues here, this Court should not hold the petition for certiorari. The heart of the issue here is whether Congress acted within its Commerce Clause authority in creating the FRCD, and *Jinks* cannot affect that analysis. The Tenth Amendment issues raised in both cases, though factually similar in the sense that both involve federal provisions that act to toll state limitations periods, are nonetheless quite different legally because of the sovereign immunity question raised in *Jinks*. Indeed, this Court could inadvertently misdirect the result here if it chose to intertwine this case with *Jinks* by holding this petition now, and later granting, vacating, and remanding this case to the court of appeals for further consideration in light of the *Jinks* decision. Such a result would signal the court of appeals to rest its decision here on the analysis in *Jinks*, despite the fact that the *Jinks* analysis will likely have little or no overlap with the issues in this case. For these reasons, this Court should deny the petition for certiorari now, rather than holding the petition for *Jinks*.

3. No Conflict Exists Within the Circuit Courts of Appeal Regarding the Proper Legal Standard for Application of the "Discovery Rule" for Accrual of Claims.

Petitioners' argument that there is a split among the circuit courts of appeal regarding the discovery rule is spurious. The court of appeals in this case applied the same legal formulation of the discovery rule as has been universally accepted by all of the circuit courts. That legal standard is familiar and straightforward: a claim does not accrue for purposes of the discovery rule until the plaintiff knew or reasonably should have known of her injury and its cause. *See* Cert. App. 54a; 42 U.S.C. § 9658(b)(4) (defining FRCD). Petitioners have failed to demonstrate that other courts of appeals would have or should have applied a different standard.

Petitioners seek to manufacture a circuit split by mischaracterizing the analysis of the court below as relying on "subjective factors" to delay accrual of the plaintiffs' claims. According to Petitioners, the court of appeals should not have considered evidence of public information (from official sources) tending to refute any causal connection between the Landfill and the plaintiffs' injuries. Such information, say the Petitioners, amounts to nothing more than "subjective excuses" for failing to file a timely claim. Finally, Petitioners claim that the courts of appeals have split on the issue of whether to consider such "subjective" factors in applying the discovery rule. *See* Cert. Pet. at 20-25. But Petitioners' strained analysis does not wash. The court below did not consider "subjective" factors in applying the objective legal standard called for by the discovery rule, but instead applied a well-accepted

formulation for both claim accrual and for review of a grant of summary judgment.

The court of appeals determined that a material question of fact exists as to when Plaintiffs' claims arose on the basis of evidence that went to the *objective* question of whether a reasonable person should have known of the relationship between Plaintiffs' injuries and the Landfill. Because public health and environmental authorities repeatedly issued public statements reassuring local residents that the Landfill posed no health threat, the court of appeals determined that it was inappropriate for the trial court to conclude, *as a matter of law*, that Plaintiffs' claims accrued while such reassuring statements were being made. *See* Cert. App. 57a-62a. In so holding, the court of appeals merely applied the black-letter rule that, when assessing a motion for summary judgment, "the court is required to view the factual record in the light most favorable to the party against whom summary judgment is sought and to draw all factual inferences in favor of that party." Cert. App. 57a (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962) (per curiam)). The court of appeals determined that the evidence of reassuring public statements was relevant to the issue of what a reasonable person should have known – given the available information – about the causal connection between the Landfill and plaintiffs' injuries.[3] Nothing in

[3] Petitioners further demonstrate a fundamental misunderstanding of the difference between an objective and subjective test by arguing that the court of appeals should have considered the fact that the plaintiffs failed to show that they had actually read and relied upon the reassuring statements issued by government officials. *See* Pet. at 17;

(Continued on following page)

this approach conflicts with either the approach of other circuit courts of appeal or this Court.[4]

The Freier Respondents also note that, of the circuit courts of appeals cases cited by Petitioners, only one involved application of the FRCD. *See* Pet. at 21-26 (listing and describing cases). That case, *O'Connor v. Boeing North American, Inc.*, 311 F.3d 1139 (9th Cir. 2002), reached the same result as the court below reached here, based on essentially the same reasoning. Like this case, *O'Connor* involved difficult issues of science and conflicting available information regarding a causal link between toxic exposures and the plaintiffs' injuries. *See O'Connor*, 311 F.3d at 1150-51 ("whether Plaintiffs knew or should have known that the contamination from the Rocketdyne facilities

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29. Such information is irrelevant to the objective determination of whether, if plaintiffs had conducted a reasonably diligent investigation of the cause of their injuries, such an investigation would have revealed that cause. In other words, plaintiffs' claims will not be time-barred by their subjective failure to exercise reasonable diligence, if even a reasonably diligent plaintiff would still not have discovered the cause of their injuries. *See, e.g., Hobson v. Wilson*, 737 F.2d 1, 35 & n.107 (D.C. Cir. 1984) (the plaintiff "is held to be on notice of all facts he could have learned through reasonably diligent inquiry.") The court of appeals found that a material question of fact exists with respect to that objective question of what a reasonably diligent plaintiff would have discovered under these circumstances.

[4] Petitioners consistently suggest that the court of appeals determined that the reassuring government reports "delay," "extend," or "toll" accrual of plaintiffs' claims. This is wrong. Instead, the court of appeals merely determined that the *factfinder* must decide when the claim accrued, based on the relevant information available to a reasonably diligent plaintiff. Merely because the court of appeals found that there was evidence sufficient to create an issue of fact does *not* mean the court determined that plaintiffs' claims had not accrued at the time Petitioners claim.

caused their injuries depends on whether a reasonable person would have inquired about the cause of his injury in light of public knowledge about the causes of cancer and other latent diseases, including publicity about the release of hazardous substance from the Rocketdyne facilities as well as other potential causes"). The remaining cases cited by Petitioners all interpret other statutory provisions and involve dissimilar facts. Again, Petitioners have failed to demonstrate the existence of a conflict.

CONCLUSION

The Freier Respondents respectfully pray this Court deny the petition for certiorari.

Respectfully submitted,

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